IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2008-0084
	)	DEPARTMENT A
	)	
IN RE RAMON N.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 15746303

Honorable Virginia C. Kelly, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Dale Cardy
Tucson
Attorneys for State

Robert J. Hirsh, Pima County Public Defender
By Susan C. L. Kelly
Tucson
Attorneys for Minor

P E L A N D E R, Chief Judge.

¶1 In this appeal, Ramon N. challenges the juvenile court's order terminating his probation as unsuccessful on the ground that he is incompetent. He also asks us to remand this matter to the juvenile court so it may determine whether he was incompetent when he

was adjudicated delinquent, in which case, he argues, the adjudications must be vacated and dismissed with prejudice. We affirm for the reasons stated below.

¶2 Ramon was adjudicated delinquent in October 2006 after the juvenile court found he had committed disorderly conduct. The court placed him on six months' probation. About six months later, the state filed a petition to revoke probation. After Ramon admitted he had used marijuana and missed school, the court continued him on probation, adding an additional four months to the probationary period. In October 2007, the state again filed a petition to revoke probation. Ramon admitted he had tested positive for marijuana and violated gang association conditions; the court continued him on probation for one year, commencing November 2007.

¶3 Ramon was referred to the Pima County Juvenile Court Center Drug Court Program. During the screening process for that program, defense counsel became concerned about Ramon's competency. Counsel filed a motion for psychological evaluation of Ramon pursuant to A.R.S. § 8-291.01, and the juvenile court ordered Ramon examined by two mental health experts. The evaluations were conducted in May and June 2008, and the experts found Ramon was incompetent; Dr. Rodriguez concluded Ramon could not be restored to competency within six months.[1] *See* A.R.S. § 8-291.07(C)(3) (requiring mental health examiner to determine whether juvenile found incompetent can be restored to competency within six months or less); *see also* A.R.S. § 8-291.09(D)(1) (requiring state to

[1]The competency evaluation reports were sealed in the juvenile court and are not in the record on appeal. But the parties do not dispute their relevant content.

pay for inpatient treatment to restore incompetent juvenile to competency unless there is "no substantial probability" of such restoration within six months of initial determination of incompetency).

¶4 After a status hearing in August, the court found Ramon was not competent to proceed at that time and could not be restored to competency within six months. The court asked the probation officer whether she believed Ramon should be continued on probation under the circumstances. The probation officer responded that she was concerned about holding Ramon "accountable for not complying, or [for] his marijuana usage," but did not object to continuing probation supervision so that he could remain in the community with someone "checking up on him."

¶5 The juvenile court terminated probation as unsuccessful. On appeal, Ramon first contends that, in light of his incompetency, the court erred when it terminated his probation as unsuccessful. He argues he was incapable of complying with the terms of probation because he could not have fully understood those terms and could not, therefore, be held responsible for being unsuccessful on probation. In its answering brief, the state correctly notes that Ramon's counsel had asked the court to terminate probation. The state asserts the court did not err by characterizing the termination as unsuccessful because that characterization is correct. The state also asserts the record supports the court's "finding" that Ramon understood the difference between right and wrong and understood he was prohibited from using marijuana. The state suggests this further supports the court's order terminating probation unsuccessfully.

¶6 As Ramon correctly points out in his reply brief, however, there are significant distinctions between an insanity defense and competency. We agree with Ramon that, to the extent the state is suggesting he understood the conditions of probation, knew the difference between right and wrong, and was therefore competent, the state is mistaken. A juvenile is incompetent if he "does not have sufficient present ability to consult with [his] lawyer with a reasonable degree of rational understanding or . . . does not have a rational and factual understanding of the proceedings against [him]." A.R.S. § 8-291(2). But an insanity defense is different; a juvenile may defend against a charge of delinquency on the ground the juvenile did not appreciate the wrongfulness of his conduct. *See In re Natalie Z.*, 214 Ariz. 452, ¶¶ 6-8, 153 P.3d 1081, 1084-85 (App. 2007) (finding appropriate juvenile court's application of A.R.S. § 13-502(A), which sets forth insanity defense in adult prosecution, to delinquency proceeding); *see also State v. Roque*, 213 Ariz. 193, ¶ 72, 141 P.3d 368, 389 (2006) (acknowledging Arizona's definition of insanity includes that "person did not know that what he was doing was wrong"). Ramon's counsel noted the difference between competency and insanity as a defense to a criminal charge at the status hearing on the issue of Ramon's competency. Conceding Ramon knew the difference between right and wrong, at least with respect to the prohibition against the use of marijuana, counsel insisted Ramon did not understand the legal process or most of the conditions of probation. As in the analogous context of an adult prosecution, *see* A.R.S. § 13-4505; Ariz. R. Crim. P. 11, a juvenile may "not participate in a delinquency, incorrigibility or criminal proceeding if the

court determines that the juvenile is incompetent to proceed." § 8-291.01(A);[2] *see also* *Alexandria M. v. McClennen*, 216 Ariz. 441, ¶ 11, 167 P.3d 128, 131 (App. 2007) (if juvenile is found incompetent, "legislature has prohibited the youngster from participating in a delinquency proceeding during the incompetency").

¶7 Nevertheless, it is unquestionably "within the [juvenile] court's authority pursuant to Rule 31(D), Ariz. R. P. Juv. Ct.," to terminate a juvenile's probation as unsuccessful. *In re Themika M.*, 206 Ariz. 553, ¶ 6, 81 P.3d 344, 345 (App. 2003). That Ramon was unsuccessful on probation was amply established by the record and is not disputed. The characterization is correct, regardless of the reason for Ramon's lack of success, including his incompetency.

¶8 More problematic, however, is whether Ramon should have been adjudicated delinquent and placed on probation in the first instance, in light of his subsequently having been found incompetent. If it were to be determined Ramon had been incompetent when he was adjudicated delinquent, the issue regarding the termination of probation as unsuccessful would be moot. But based on the record before us, we conclude that issue was not actually presented to the juvenile court, notwithstanding Ramon's suggestion to the contrary. Consequently, the issue has not been squarely placed before us to decide.

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[2]At the status hearing, the issue became whether Ramon should remain on probation in light of the fact that he was found to be incompetent. Explaining Ramon would not be able to fully understand the conditions, defense counsel requested that probation be terminated. Thus, Ramon consented to the status hearing proceeding notwithstanding his incompetence.

¶9 The record shows that, in discussing with the court the various options for Ramon in light of his recently discovered incompetency, his counsel stated she did not "think he was competent at the time of his original adjudication or he was restorable at that time." She added, "I thought about whether to do a set-aside of his original adjudication that placed him on probation, basically ineffective assistance of counsel . . . ." She told the court she was looking into the matter further and, after objecting to termination of probation as unsuccessful, stated, "I suppose where I'm going would be to follow up and set aside the original adjudication . . . and I can follow up with a motion to set aside." The court commented that it thought Ramon's previous attorney would need to be "involved." Ramon's counsel informed the court she had discussed the matter with prior counsel.

¶10 Thus, it appears the juvenile court and Ramon's counsel simply discussed the possibility of counsel's filing a motion to set aside the adjudication. Both contemplated further investigation would be necessary. The record before us reflects that no motion to set aside was pending at the time of the status hearing or filed thereafter. The court did not abuse its discretion, therefore, by not sua sponte vacating the adjudication. As the state points out, the court did not foreclose the possibility of entertaining such a motion; rather, it permitted Ramon to "take whatever steps you want to take" after it terminated his probation. This court will not address the question of Ramon's competency at the time of the adjudication in the first instance; rather, it is for the juvenile court to address that issue if or when presented and to decide, in the exercise of its discretion, whether Ramon was competent at the time he was adjudicated delinquent. *See In re Charles B.*, 194 Ariz. 174,

¶ 7, 978 P.2d 659, 662 (App. 1998) (whether juvenile is competent to proceed with delinquency is for juvenile court to determine, and court of appeals will not disturb that determination absent abuse of discretion); *see also Simon v. Safeway, Inc.*, 217 Ariz. 330, n.6, 173 P.3d 1031, 1036 n.6 (App. 2007) ("appellate court does not address issue trial court failed to resolve").

¶11 For the reasons stated herein, we affirm the juvenile court's order terminating Ramon's probation as unsuccessful.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge